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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SANTA CLARA VALLEY WATER DISTRICT,
DONALD A. LAWRIE, AND CITY OF MORGAN HILL,

Petitioners,

vs.

BRUNO MARTINO AND EUGENIA MARTINO,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

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QUESTIONS PRESENTED

The SANTA CLARA VALLEY WATER DISTRICT, CITY OF MORGAN HILL, and DONALD A. LAWRIE respectfully petition that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals, Ninth Circuit, entered in this proceeding on April 14, 1983.

1. Does a claim that local land use regulations, as implemented, are an unconstitutional taking under the Fifth Amendment of the United States Constitution constitute a "concrete controversy" permitting federal judicial intervention where the landowner fails to submit any development plan to the local regulatory body?

2. Can planning and regulatory activities performed by local governmental bodies done to protect a floodway area in conformity with state and federal requirements which does not result in the adoption of any resolution of condemnation or prosecution of an eminent domain lawsuit deprive the landowners of substantially all reasonable use of their property so as to constitute a "taking" under the Fifth Amendment of the United States Constitution?

3. Can a landowner's challenge to a regulation claimed to be unconstitutional as implemented be deemed to be "ripe" for Federal Court consideration where no affirmative steps towards condemnation have been taken and no development plan has been submitted for review to the governing bodies of the local regulatory agency?

4. Can there be a violation of 42 U.S.C., §1983 based upon an alleged regulatory taking in violation of the Fifth Amendment of the United States Constitution if, as a matter of law, no "taking" can be shown to have occurred?

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ORDERS BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit was reported, but was not yet in print in the Federal Reporter when this Petition was prepared, and appears in the Appendix hereto (See Appendix A). The Mandate of the United States Court of Appeals for the Ninth Circuit was filed on April 14, 1983, and appears in the Appendix hereto (See Appendix B).

JURISDICTION

The Decision of the United States Court of Appeals for the Ninth Circuit was entered on April 14, 1983. Under 28 U.S.C., §1254(1), this Court's jurisdiction is invoked.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury, . . .; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment 14, §1:

"All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES STATUTES

Federal Civil Rights Act of 1871, 42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at suit, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a Statute of the District of Columbia."

CALIFORNIA STATUTES

Water Code (Cobey-Alquist Flood Plain Management Act), §8401:

"The Legislature finds and declares that:

(a) A large portion of the state's land resources is subject to recurrent flooding by overflow of streams and watercourses causing loss of life and property, disruption of commerce, and

interruption of transportation and communications, all of which are detrimental to the health, safety, welfare, and property of the people of this state.

(b) The public interest necessitates sound development of land use, as land is a limited, valuable, and irreplaceable resource, and the flood plains of this state are a land resource to be developed in a manner which, in conjunction with economically justified structural measures for flood control, will result in (1) prevention of loss of life, and (2) prevention of economic loss caused by excessive flooding.

(c) The primary responsibility for planning, adoption, and government to plan land use regulations to accomplish flood plain management rests with local levels of government.

(d) It is the policy of this state to encourage local levels of government to plan land use regulations to accomplish flood plain management and to provide state assistance and guidance therefor as appropriate."

Water Code (Cobey-Alquist Flood Plain Management Act), §8402:

"Unless the context otherwise requires, the following definitions apply throughout this chapter:

(a) "Department" means Department of Water Resources.

(b) "Board" means the State Reclamation Board.

(c) Wherever the words "department or board" or "department and board" are used together in this chapter they shall mean board as to any area within a project which by law is under the jurisdiction of the State Reclamation Board, and the department in all areas of the state outside these areas.

(d) "Public agency" means any city, city and county, county, or district organized, existing, and acting pursuant to the laws of this state.

(e) "Design flood" means the selected flood against which protection is provided, or eventually will be provided, by means of flood protective or control works. When a federal survey has been authorized the design flood will be determined

by the appropriate federal agency and in all other cases it will be determined by the responsible local agency. It is the basis for design and operation of a particular project after full consideration of flood characteristics, frequencies, and potentials and economic and other practical considerations.

(f) "Designated floodway" means the channel of a stream and that portion of the adjoining flood plain required to reasonably provide for the construction of a project for passage of the design flood including the lands necessary for construction of project levees.

(g) "Restrictive zone" means the portion of the natural floodway between the limits of the designated floodway and the limits of the flood plain where inundation may occur but where depths and velocities are generally low.

Water Code (Cobey-Alquist Flood Plain Management Act), §8410.5:

"All public agencies shall comply with flood plain regulations established to meet the requirements of §8411. For the purposes of this section, "public agencies" includes the state or any department or agency thereof."

Water Code (Cobey-Alquist Flood Plain Management Act), §8411:

"Within any area classified "designated floodway" by the department or board after completion of a federal project report, the appropriate public agency shall establish the necessary flood plain regulations within one year following notification by the department or board. The state shall not pay any of the cost of lands, easements, and rights of way associated with the flood control project as set forth in the project report of the federal agency unless flood plain regulations for the designated floodway are adopted in accordance with the requirements of this chapter."

California Code of Civil Procedure, §1245.220:

"A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this Article."

California Code of Civil Procedure, §1245.230:

"In addition to other requirements imposed by law, the resolution of necessity shall contain all of the following:

(a) A general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the public entity to acquire the property by eminent domain.

(b) A description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification.

(c) A declaration that the governing body of the public entity has found and determined each of the following:

(1) The public interest and necessity require the proposed project.

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(3) The property described in the resolution is necessary for the proposed project.

LOCAL ORDINANCES

City of Morgan Hill Municipal Code, Title VIII Chapter 1, Section 3.14-16 (Ordinance No. 522, New Series):

"*Variance Procedure*

(a) *Appeal Board*

(1) The City Council shall hear and decide appeals and requests for variances from the requirements of this ordinance.

(2) The City Council shall hear and decide appeals when it is alleged there is an error in any requirement, decision, or determination made by the Community Development Director in the enforcement or administration of this ordinance."

City of Morgan Hill Municipal Code, Title VIII Chapter 1, Section 3.14-5:

" 'Appeal' means a request for a review of the Community Development Director's interpretation of any provision of this ordinance or a request for a variance."

Santa Clara Valley Water District Ordinance No. 74-1:

See Appendix C.

STATEMENT OF THE CASE

At issue in this case is the question of whether land owners who have filed a lawsuit for inverse condemnation and violation of the Civil Rights Act (42 U.S.C. §1983) claiming an unconstitutional regulatory "taking" under the Fifth and Fourteenth Amendments of the United States Constitution can show a "concrete controversy" and sufficient "ripeness" of the facts for determination by a federal court when no specific plan for development of the property is question was ever submitted to the responsible local government entity allowing specific application of land planning and regulatory ordinances to the owner's property. Further at issue, is whether a violation of the Civil Rights Act (42 U.S.C. §1983) can occur under such circumstances as described above if there is insufficient "ripeness" and no "concrete controversy" is present on the issue of an unconstitutional regulatory taking.

The certified excerpts of record before the lower court contain the following pertinent facts:

Since December 26, 1974, property owners BRUNO MARTINO and EUGENIA MARTINO ("property owners") have been the owners in fee simple of approximately 4.4. acres located along Edmundson Avenue in the City of Morgan Hill, County of Santa Clara. In 1975, as a result of application being made to the CITY OF MORGAN HILL, their property was divided up into three parcels, two of which are the subject of this lawsuit.

Petitioners SANTA CLARA VALLEY WATER DISTRICT ("WATER DISTRICT") and the CITY OF MORGAN HILL ("Petitioners") are government entities authorized to acquire real property for public use by purchase or exercise of eminent domain.

As a result of the history of major flood problems in the past and predictions of more frequent flooding problems in the future, formal flood control studies began in 1960 culminating in the adoption in 1969 of the Llagas Creek Watershed Project Plan. This was some five years before the property owners acquired the property in question.

Feasibility studies were conducted by the Soil Conservation Service which culminated in 1967 with findings which were then used to support the authorization of a flood control project by Congress in 1969.

The Llagas Creek Watershed Project Plan (hereinafter the "Llagas Project") was created by virtue of three sponsoring agencies (Loma Prieta Resource Conservation District, South Santa Clara Valley Conservation District and Santa Clara Valley Water District) and three governing bodies (Santa Clara County and the Cities of Gilroy and Morgan Hill). The purpose of the Llagas Project concerned watershed protection and flood prevention for a 66,400 acre watershed area in southern Santa Clara County, including portions of the City of Morgan Hill where the subject property is located. In addition, the Llagas Plan had three main components: (1) providing land treatment measures to reduce erosion and sediment production within the watershed; (2) modifying about 29.4 miles of the Llagas Creek and its major tributaries to increase capacity and construction levees to limit the flood plain width along about 2.8 miles of Llagas Creek; and (3) raising Chesbro Dam eleven (11) feet. At all times material hereto, the subject property has been designated within the plan for channel excavation and construction after public acquisition of the necessary portion by the Petitioner WATER DISTRICT.

About eleven miles of channel excavation was done during 1971 and 1972 to provide fill for the South Valley Freeway construction. About 1.2 miles of channel was constructed by the public law 566 project in 1973.

The flood control project was halted in 1974 by the sponsors for restudy to insure compliance with environmental laws. The restudy by citizen's committee and the Soils Conservation Service was completed in 1976 and subsequently an environmental impact statement (EIS) was initiated. The first draft of EIS was completed in 1979 and its adoption along with any changes required thereby or occasioned by fiscal considerations made by Congress had not yet occurred at the time this suit was filed. During the aforesaid interlude and up until the time of the filing of the lawsuit herein no federal or state monies have been allocated for either construction or acquisition regarding the balance of the project including the portion in which the subject property was located.

The California Colby-Alquist Flood Plain Management Act (Calif. Water Code Section 8400 et seq.) placed responsibility on local entities to enact and enforce ordinances to protect "designated floodways". The definition of "designated floodways" under said act was that portion of an existing river or channel with regard to which it is necessary to have improvements performed in order to protect the public from flood hazard.

In addition, the Federal Flood Insurance Administration (FIA) did a study resulting in a map determining the areas of property including the area adjacent to and including the Llagas Creek area which would be flooded up to one foot in the event of a design flood which was defined as a hundred year flood. Within these areas the FIA required that local public entities enact ordinances to protect "floodways". The definition under the FIA for "floodways" is that portion of a creek or riverbed which in view of the expected flow with a given design flood would be the most hazardous area. Both Petitioners are required to comply with both the State and Federal requirements.

On March 26, 1974, the Petitioner WATER DISTRICT by unanimous vote of its Board of Directors, adopted Ordinance No. 74-1 which in pertinent part provided that "it shall be unlawful after the effective date of this ordinance for any person, firm, corporation, the County of Santa Clara, the government of the United States, and agencies thereof, or any

municipal corporation or district to do or cause to be done any of the following: . . . (b) construct, place or maintain any structure or perform any grading upon a levee or on a district project without a permit from the district. Further, Section 10 of said ordinance, entitled "Dedications", provides: "In order to permit the provision of flood control services by the district, the engineer will request, wherever equitable and appropriate, that the city or the county having jurisdiction secure flood control dedications to the district from landowners seeking a change of land use.

On August 20, 1975, when presented with the request by the MARTINOS for permission to divide their property into three parcels, the planning commission staff of Petitioner MORGAN HILL recommended that property owners by requested to dedicate or reserve a 96-foot strip across the property as the condition to granting their request to divide their property. Property owners resisted this request and appealed to the City Council of Petitioner MORGAN HILL. The property owners requested that they not be required to dedicate or reserve any portion of the property for purposes of the flood control channel which runs through it. The property owners' representation at that time was that they *did not intend to develop this property* but were only dividing it because of a death in the family. Based upon this representation the City Council approved the division of the property owners' land and reduced the request for dedication to 35 feet with a reservation of the balance of 61 feet for future purchase in the event the Flood Control District needed it. Subsequently, the third parcel consisting of one acre was improved and leased out as a Burger-King site. Thereafter, the property owners conveyed the 35-foot easement to the Petitioner WATER DISTRICT without compensation.

In January of 1980, Petitioner MORGAN HILL completed a general plan policy draft including the statement that "development shall be prohibited within the floodway areas". On June 18, 1980, Petitioner MORGAN HILL adopted Ordinance No. 522, New Series, as an urgency measure. This flood damage prevention ordinance was added to the City Zoning Ordinance.

After obtaining the division of the original property into three parcels the two parcels which are the subject of this action were continued to be used for the uses for which historically they had been used. One was used for agricultural grazing; the other was rented out for residential income. Not only was there no interference with the property owners continued use of the properties but no attempt was made by the property owners to put the property up for sale prior to the filing of the lawsuit herein. As a matter of fact, the property owners had no intention of selling their property at any time after acquiring it and before the filing of the lawsuit herein.

Beginning in the summer of 1980, the property owners requested information from the Petitioners WATER DISTRICT and MORGAN HILL regarding their remaining two parcels of property. Specifically, on July 3, 1980, property owner BRUNO J. MARTINO wrote Petitioner DONALD A. LAWRIE as Chief Real Estate Agent for Petitioner WATER DISTRICT requesting information within 30-days as to if and when the WATER DISTRICT intended to purchase the right of way for the Little Llagas Creek and asked for a date "plus or minus 90-days". He further asked in the event a specific date of purchase could not be given, whether the Petitioner WATER DISTRICT planned to condemn the parcel or a portion of it for the right of way. Finally, he requested information as to what effect it would have upon the present proposed right of way area if a development plan were submitted for only one parcel and/or for more than one parcel.

On July 18, 1980, Petitioner DONALD LAWRIE responded to the property owners' inquiry advising them that their parcel was affected by the *proposed* project on West Little Llagas Creek which is one of the streams involved in the *proposed* Public Law 566 Llagas Watershed Project. (emphasis added). Petitioner LAWRIE then went on to point out that the project itself has been "in a moratorium stage for several years, while undergoing a restudy in preparation of an Environmental Impact Statement (EIS). The target date for completion of the EIS and *probable* reauthorization of the project is July 1, 1981" (emphasis added). Having pointed out that the project had not yet been reauthorized, Petitioner LAWRIE proceeded to

describe what would normally happen if reauthorization were to occur and, making the assumption of reauthorization in July of 1981, predicted the construction schedule and right of way acquisition schedule which would most likely follow. Continuing with the assumptions with regard to reauthorization and scheduling, Petitioner LAWRIE responded that the "right of way requirements" would be the same if the property owners were to submit the development plan prior to project acquisition as the *proposed* right of way width currently in the plan. (emphasis added).

Apparently dissatisfied by the response from Petitioner LAWRIE and his inability to be specific because of the fact the project was currently in an inactive state because of a moratorium, (the EIS had not yet been approved and the project had not been reauthorized), property owner BRUNO J. MARTINO wrote a letter on or about July 23, 1981 repeating his questions regarding specificity of dates and plans. On July 25th, Petitioner LAWRIE again responded to the property owner MARTINO's inquiry by reiterating the fact that his earlier letter stated "the probable time of acquisition of right of way" and then proceeded to state "there are too many unknown factors at this time to pin it down to plus or minus 90-days as suggested in your letters". Petititioner LAWRIE's letter then proceeded to outline in generalities the usual procedure to be followed in the event all of the conditions necessary to obtain reauthorization of the project occur. Petitioner LAWRIE, referring to the unfulfilled conditions which prevented any final decisions, stated that "after funding is assured, hopefully sometime after July 1, 1981, it might be possible for the District to purchase some properties substantially in advance of construction priorities... if individual owners have special hardship circumstances which make it important that the acquisition date be advanced". As to submission of a development plan, Petitioner LAWRIE advised that if one were submitting during the "present restudy period and prior to the completion and approval of the Environmental Impact Statement, the District would *request* that the entire 180-feet of right of way be dedicated". Since the Petitioner CITY OF MORGAN HILL through its Planning Commission and City Council had the sole authority to approve a development plan within the city limits,

the reference to "request" clearly referred to the desires of the Water District being communicated to Petitioner MORGAN HILL for final decision.

On September 10, 1980 MARTINOS wrote to MORGAN HILL with inquiries regarding information concerning requirements which might be imposed by the City in the event the property owners MARTINOS attempted to develop the subject property. On September 6, 1980, the Community Development Director of the City of Morgan Hill responded and opened his letter by pointing out that "the questions that you have posed in this letter are questions which cannot receive answers until you submit formal applications for projects on the assessor's parcels referenced in your letter. The questions are either hypothetical or rhetorical and require that you submit plans under formal application for a project to determine the course of events rather than trying to second-guess our evaluation of your project and the reasons why we would either approve or disapprove of it." The Director then proceeded to inform the property owners that plans submitted for a proposal to develop would have to meet all City requirements but that "you certainly can't have the project approved without submitting any plans and without going through the review process typical of any development in the community." Enclosed with this letter was a copy of a policy from Petitioner MORGAN HILL's general plan relating to parcels which bordered on the Little Llagas Creek or fall within the floodway as determined by Petitioner WATER DISTRICT and which therefore must have review and approval by that entity. The letter ended by pointedly stating "if you wish to develop your properties, it is appropriate that you go through the proper steps with engineering and architectural consultants to prepare plans for the City and meet the City requirements and obtain the necessary approvals". Property owners in their lawsuit conceded that no attempt to secure a development permit for the subject property was ever made prior to filing suit.

Based upon the adoption of the ordinances, plans and policies described hereinabove and the exchange of correspondence between property owner BRUNO MARTINO and Petitioner LAWRIE and BRUNO MARTINO and Petitioner

MORGAN HILL, property owners filed suit against Petitioner DONALD A. LAWRIE, Chief Real Estate Agent for the SANTA CLARA VALLEY WATER DISTRICT, Petitioner WATER DISTRICT, and Petitioner MORGAN HILL alleging two causes of action: One being an action in inverse condemnation against the Petitioner WATER DISTRICT and Petitioner MORGAN HILL and the other being an action for violation of the Federal Civil Rights Act (42 U.S.C. 1983) and the Fifth and Fourteenth Amendments of the United States Constitution by and against Petitioner LAWRIE, individually.

On October 15, 1981, following oral argument on that date, the Honorable William H. Orrick of the United States District Court for the Northern District of California granted Petitioners' Motion for Summary Judgment on the basis that the issues presented were not yet ripe for judicial review and denied a Motion for Abstention. Property owners appealed the judgment entered upon the order granting motion for summary judgment, said judgment having been entered against property owners on October 20, 1981.

The Court of Appeals for the Ninth Circuit following oral argument issued its opinion on April 14, 1983, reversing the judgment of the District Court and remanding the matter back for trial. The mandate of the United States Court of Appeals for the Ninth Circuit on said opinion was filed on April 14, 1983. Petitioners seek relief from this Decision of the United States Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I

A Claim That Local Land Use Regulations, as Implemented, Are An Unconstitutional Taking Under the Fifth and Fourteenth Amendments Of The United States Constitution Does Not Constitute a "Concrete Controversy" Permitting Federal Judicial Intervention Where The Landowner Fails To Submit Any Development Plan To The Local Regulatory Body

There is no dispute as to the central material fact that prior to filing their lawsuit for inverse condemnation and violation of the Civil Rights Act, the property owners did not prepare and

submit for decision by the local authorized governing body (to wit, Petitioner CITY OF MORGAN HILL) a specific plan and application for a permit to develop the subject property. In addition, the property owners admitted from the outset that the issues being presented were not the validity of the statutes or ordinances but the allegedly radical implementation of the ordinances as applied to the property owners' property.

In its Decision in this matter, the Court of Appeals for the Ninth Circuit disregarded the Decision of this Court in *Agins* v *City of Tiburon* (1980), 447 U.S. 255; 65 L.Ed.2d 106; 100 S.Ct. 2138, put itself in conflict with its own prior Decision in *Pacific Legal Foundation* v *State Energy Resources Conservation & Development Commission, et al.* (9th Cir. 1981) 659 F.2d 903, cert.den. 102 S.Ct. 2959, and put the Ninth Circuit in conflict with the Fifth Circuit rule as determined in *Hernandez* v *City of Lafayette* (5th Cir. 1981) 643 F.2d 1188, cert.den. 102 S.Ct. 1251.

This Court, in *Agins* v *City of Tiburon, supra,* 447 U.S. 255, adopted the proposition that unless regulatory ordinances on their face take a property owner's land without just compensation, then the property owners must submit a development plan to the local governing body in order to determine whether the impact of the ordinance has denied them their rights under the Fifth and Fourteenth Amendments (at page 2142).

The United States Court of Appeals for the Fifth Circuit, in *Hernandez* v *City of Lafayette, supra,* 643 F.2d 1188, held in dealing with the contentions of a "taking" relating to the application of a general zoning ordinance to a particular piece of property, that "a taking does not occur until the muncipality's governing body is given a realistic opportunity and a reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity." (at page 1200).

The Fifth Circuit Court then went on to say that this relief could be accomplished "either by petitioning the city council or other appropriate body for rezoning of the property that would

allow the owner an economically viable use thereof, or by contesting the initial general zoning regulation prior to its passage." (fn. 27 at page 1200).

Section 10 of the Santa Clara Valley Water District Ordinance No. 74-1 authorizes the engineer of the Petitioner WATER DISTRICT to "request, wherever equitable and appropriate that the City... having jurisdiction secure flood control dedications to the District from landowners seeking a change of land use. Such requests shall be pursuant to and in accordance with the procedures and conditions established by such City...."

The United States Court of Appeals for the Ninth Circuit, in *Pacific Legal Foundation* v *State Energy Resources Conservation & Development Commission, et al., supra,* 659 F.2d 903, at p. 910, dealt with the issue of the constitutionality of California's Warren-Alquist Act regulating the construction and operation of nuclear power plants. While not an inverse condemnation case, it engages in a helpful discussion of "standing" as a constitutional doctrine, derived from Article III's requirement that Federal Courts decide only actual cases or controversies. The Ninth Circuit stated that this doctrine limited the Court's jurisdiction to cases in which the property owner alleges that he has suffered a particularized injury, although admittedly the injury may be slight. In addition, the Court went on to say that the doctrine requires that the property owners demonstrate both "a clearly traceable causal connection between the claimed injury and the challenged conduct".

It appears to be clear that under this Court's decision in *Agins* v *City of Tiburon, supra,* 447 U.S. 255, the United States Court of Appeals for the Fifth Circuit decision in *Hernandez* v *City of Lafayette, supra,* 643 F.2d 1188, and the United States Court of Appeals for the Ninth Circuit decision in *Pacific Legal Foundation* v *State Energy Resources Conservation & Development Commission, et al., supra,* 659 F.2d 903, the failure to submit a specific plan to the city council prevents the property owners from presenting a "concrete case or controversy". If no "taking" has occurred then in turn there is a failure to meet the requirements for "standing".

Therefore, it is clear that the property owners in this case by failing to prepare and submit for decision by the Petitioner MORGAN HILL a specific plan and application for permit to develop their property claimed to be affected by a general regulatory ordinance cannot claim that a "taking" has occurred and in turn have failed to meet the requirements for "standing".

II

Planning and Regulatory Activities Performed By Local Governmental Bodies Done To Protect A Floodway Area In Conformity With State And Federal Requirements Which Do Not Result In The Adoption Of Any Resolution Of Condemnation Or Prosecution Of An Eminent Domain Lawsuit Does Not So Deprive Landowners Of Substantially All Reasonable Use Of Their Property As To Constitute A Taking Under The Fifth Amendment Of The United States Constitution

Absent the existence of a resolution of condemnation or the filing of an eminent domain lawsuit, mere planning and regulatory activities cannot constitute an official intention to acquire nor does it constitute the required physical invasion or direct restraint upon property owner's property necessary to justify compensation. *Village of Euclid* v *Ambler Realty Co.* (1926), 272 U.S. 365; 71 L.Ed. 303; 47 S.Ct.Rptr.114.

As the Supreme Court of California noted in the case of *Selby* v *City of San Buenaventura,* (1973) 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111.

> "Adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property.... In order to state a cause of action for inverse condemnation, there must be an invasion or appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury. 10 Cal.3d at 119-20, 109 Cal.Rptr. at 805, 514 P.2d at 117."

It has been held that a municipality's mere inclusion of certain property in the general neighborhood renewal plan area alone, is not, absent other conduct by the city, a "taking" for

purposes of inverse condemnation. *Sayre* v *City of Cleveland* (6th Cir. 1974) 493 F.2d 64. The California Supreme Court has ruled that enactment of a general plan for future development of an area, including potential public uses for private land, does not amount to inverse condemnation of affected property. *Selby Realty Company* v *City of San Buenaventura, supra,* 10 Cal.3d 110, 109 Cal.Rptr. 799.

The United States Supreme Court decision in *Agins* v *City of Tiburon, supra,* 447 U.S. 255, is highly instructive with regard to the property owners' contention of illegal pre-condemnation activities amounting to a taking: Footnote 9, of the Court's Decision, states:

> "Appellants also claim that the City's pre-condemnation activities constitute a taking. See fn 1, 3 and 5, supra. The State Supreme Court correctly rejected the contention that the municipality's good faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also *City of Walnut Creek* v *Leadership Housing Systems, Inc.,* 73 Cal.App.3d 611, 620-624, 140 Cal.Rptr. 690 695-697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth* v *United States,* 308 U.S. 271, 284, 84 L.Ed. 240, 60 S.Ct. 231 (1939). See *Thomas W. Garland, Inc.,* v *City of St. Louis,* 596 F.2d 784, 787 (CA8), cert.denied ------U.S.------, 62 L.Ed.2d 135, 100 S.Ct. 208 (1979). *Reservation Eleven Associates* v *District of Columbus,* 136 U.S. App. (DC) 311, 420 F.2d 153, 157-158 (1969); *Virgin Islands* v *50.05 Acres of Land,* 185 F.Supp. 495, 498 VI 1960; 2 Nichols, Eminent Domain 6.13 (3) 3d.ed 1979."

In overruling the District Court's determination that *Agins* was controlling, the Ninth Circuit Court of Appeals appears to

have misconstrued the *Agins* decision itself and the basis upon which the District Court granted the WATER DISTRICT's and MORGAN HILL's motion for summary judgment.

The District Court held that *Agins* and *Selby Realty Company* v. *City of San Buenaventura, supra,* 10 Cal.3d 110, were controlling in that reliance upon a general plan was not sufficient to constitute inverse condemnation. The District Court went on to say that there must be an invasion or an appropriation directly and specifically affecting the landowner to his injury. In this particular case, property owners had made no application or other showing to indicate that there had been an appropriation. The failure to make an application in and of itself was not used by the Court as the determinative factor. Rather it was the absence of any indication that there had been an invasion or *any action* by the governing bodies which led to the determination.

The Court of Appeals also erred in disagreeing with the District Court's interpretation that no "invasion" was found in *Agins.* Contrary to the Ninth Circuit opinion, *Agins* did not stated that there had been an invasion, albeit an inadequate one. There is no indication from the *Agins* decision that any invasion was found. The misunderstanding exhibited by the Ninth Circuit's comments referring to the *Agins* case indicates that the Court of Appeals was erroneously applying the law which had been properly determined by the District Court. As a matter of law, good faith precondemnation planning and regulatory activities do not constitute a taking under the Fifth Amendment to the Constitution.

In order to show unreasonable precondemnation activity, a governing body must have taken some action directly affecting and substantially interfering with a landowner's property.

In the case of *Elks Hall Association* v *Richmond Redevelopment Agency* (9th Cir. 1977) 561 F.2d 1327, the redevelopment agency adopted a plan including the property within the redevelopment area, but in addition began acquiring and demolishing surrounding properties with the result that the owner was unable to obtain insurance or loans on the property, tenants told of the scheduled acquisition actually vacated the

premises costing him rental income, and the agency undertook street improvements adjacent to the property itself which directly caused flooding into the subject property's basement. Thereafter, the Agency announced its intention not to acquire the property. Under these facts, the court concluded that the Agency had acted to directly and substantially interfere with the property rights of the landowner thereby significantly impairing the value of the property and therefore affecting a compensible taking in inverse condemnation. Such a factual situation is clearly distinguishable from those presented to this court in the case at hand.

In this case, the adoption of a long-range Llagas Creek Watershed Project Plan which included improvements down the line timewise to a flood area adjacent to and including a portion of the property owners' property alone is clearly insufficient. The mere adoption of such a plan, even though it involves the ultimate acquisition of property rights to complete the improvements proposed in the plan, is not tantamount to a formal declaration of intent to condemn under California law. (Code of Civil Procedure Sections 1245.220-1245.240.) Nor is the mere adoption of Santa Clara Valley Water District Resolution No. 74-1 authorizing the Petitioner when necessary to take action to protect the floodways and flood control areas. Such a situation is more analogous to planning alone.

The undisputed facts presented to the District court in this case revealed no specific action taken by either governing body of Petitioners to either acquire the subject property or to directly interefere with or impair the property owners' right to use or dispose of their property. While the uncontradicted evidence showed that the Llagas Creek Watershed Project Plan called for long range construction of channels and improvements affecting the subject property, there is no evidence of monies allocated for acquisition purposes, no formal declaration of intent to acquire, no resolution of condemnation and necessity had been adopted, and no eminent domain lawsuit had been prepared or filed. But even if the subject property had been specified for future acquisition it is well established that a delay for a reasonable and limited period of time in order to purchase land specified for acquisition is appropriate and

does not give rise to liability in inverse condemnation. In addition to the authorities cited above, see *Gulf Oil Corporation* v *Morton* (9th Cir. 1973) 493 F.2d. 141.

The Court of Appeals' ruling that *Agins* was not dispositive of this case on summary judgment was erroneous. Under *Agins*, a mere enactment of a zoning ordinance is not sufficient to constitute a taking. An ordinance is unconstitutional on its face only when its effect is to deprive the landowner of substantially all reasonable use of his property. In this case, while there was a declaration of intent to acquire property for flood protection improvements, no condemnation resolution has been adopted or filed and there has been no action or "direct restraint" which prohibits property owners from using their land for the same uses and purposes for which they have used it historically. This is a situation where the adverse effect (if any) will come about only upon the denial of an application. Since property owners have not made an application, no adverse effect exists.

III

A Property Owner's Challenge To A Regulatory Ordinance Claimed To Be Unconstitutional As Implemented Cannot Be Deemed To Be "Ripe" For Federal Court Consideration When No Affirmative Steps Have Been Taken Toward Condemnation And No Specific Development Plan Was Ever Submitted To The Local Governing Body In Order To Allow It To Apply The General Ordinance To The Specific Property

It is undisputed that prior to filing their lawsuit, the property owners did not prepare and submit for decision to the local authorized governing body, to wit, the Petitioner MORGAN HILL, a specific plan and application for permit to develop their property. Furthermore, from the outset in the trial court the property owners have admitted that the question is not the validity of the ordinances on their face, but their implementation as applied to their property. This Court, in *Agins* v *City of Tiburon, supra*, 447 U.S. 255, held that unless regulatory ordinances on their face take a property owner's

property without just compensation, then the property owners must submit a development plan to the city to determine whether the impact of the ordinance has denied them their rights under the Fifth and Fourteenth Amendments (at page 2142).

The U.S. Court of Appeals for the Fifth Circuit in *Hernandez* v *City of Lafayette, supra,* 643 F.2d 1188, p. 1200, as follows:

> "However, in cases such as the one before us, where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come to result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but relief from such classification, we conclude that *a "taking" does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity.*" (emphasis added)

The United States Court of Appeals for the Ninth Circuit in *Pacific Legal Foundation* v *State Energy Resources Conservation & Development Commission, et al., supra,* 659 F.2d 903, p. 915, discusses the issue of "ripeness" as one involving the question of whether the challenge to a given statutory provision is ripe for judicial review. In discussing this issue the United States Court of Appeals for the Ninth Circuit stated:

> "The doctrines of standing and ripeness are closely related, in that the application of either is intended to 'prevent courts from becoming enmeshed in abstract questions which have not concretely affected the parties' (Citations listed). Like standing, the ripeness doctrine is based in part on the Article III requirement that courts decide only cases or controversies (Citations listed). The exercise of judicial restraint, however, is an added ingredient of the ripeness doctrine by which courts can decline to decide issues which are not yet fit for adjudication (Citations listed). Thus, *while both doctrines require us to ask whether*

the plaintiff has suffered harm, ripeness requires an additional inquiry into 'whether the harm asserted has matured sufficiently to warrant judicial intervention'". (Citation listed). (emphasis added).

In this same decision, the United States Court of Appeals for the Ninth Circuit emphasized the importance of waiting until a challenged statute or regulation was actually applied to a specific property. In so stating, the Court said:

"A challenge to a statute or regulation that has not yet been applied is generally considered fit for judicial determination if the issue raised is a 'purely legal one' (Citation listed), or one which 'further factual development will not *render more concrete'* " (Citations listed). *On the other hand, if the issue would be illuminated by the development of a better factual record the challenged statute or regulation is generally not considered fit for adjudication until it has actually been applied."* (Citations listed). (emphasis added).

Both State and Federal courts have traditionally exercised a necessary degree of discretion in determining when an alleged controversy is ripe for adjudication. See *MacLarty* v *Borough of Ramsey* (3rd Cir. 1959) 270 F.2d 232; *United States* v *Superior Court* (1941) 19 Cal.2d 189. There is well established policy of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty. See *Rescue Army* v *Municipal Court* (1947) 331 U.S. 549; 91 L.Ed. 1666; 67 S.Ct. 1409. This has been true of suits questioning the constitutionality of zoning ordinances. See *Brawner Building, Inc.* v *Shehyn* (D.C. Cir. 1971) 442 F.2d 847; 143 U.S. App. DC 125.

The reasons for requiring "ripeness" as enumerated by the courts embrace not only considerations of federal judicial administration, but also the desirability of having local government place a practical meaning upon the language and purpose of the challenged regulation prior to any federal adjudication of potential constitutional issues. If local government's actions serve to eliminate any such constitutional questions, then resort to the federal courts may become unnecessary. In addition,

there are considerations of federalism and comity, not to mention the dictates of common sense. As the Chief Justice noted in his opinion in *Moore* v *City of East Cleveland* (1977) 431 U.S. 494, 497, 52 L.Ed.2d 531, 97 S.Ct. 1932:

> "[I]t is common sense to permit the simple, speedy, and inexpensive processes of the administrative machinery to sift the facts and compile a complete record for the benefit of any reviewing courts. Exhaustion avoids interruption of the administrative process and allows application of an agency's specialized experience and the broad discretion granted to local entities, such as zoning boards. Indeed, judicial review may be seriously hampered if the appropriate agency has no chance to apply its experience, exercise its discretion or make a factual record reflecting all aspects of the problem." (Id. at 534-35).

By failing to submit a specific plan to Petitioner MORGAN HILL, the property owners prevented MORGAN HILL from utilizing its variance procedure found in its Zoning Ordinance Section 3.14-16 and the appeal procedure provided in its Zoning Ordinance Section 3.14-5. Further, the flexibility provided under Santa Clara Valley Water District Ordinance 74-1 to take equitable considerations into account insofar as enforcing the Water District's Ordinance was prevented by the property owners' own conduct.

The issue presented is one involving the federal ripeness doctrine, not a state doctrine of exhaustion of administrative remedies. As it has evolved, the federal ripeness doctrine is a form of judicial restraint designed to allow the local government entities to deal in a definitive and specific manner with objections to general regulatory ordinances as they affect a particular property owner's land. It is important that this policy should be continued and that it require a property owner when claiming an unconstitutional implementation of a general regulatory ordinance, where no affirmative steps towards condemnation have been taken, to submit for review by the governing body a specific plan for development in cases such as this.

IV

There Cannot Be A Violation of 42 U.S.C., §1983 Based Upon An Alleged Regulatory Taking In Violation Of The Fifth Amendment Of The United States Constitution If As A Matter Of Law, No Taking Can Be Shown To Have Occurred

42 U.S.C. §1983, which authorizes redress for violations of constitutional and statutory rights, is not itself a source of substantive rights, but rather a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes. In any suit under Section 1983, the first inquiry is whether the property owners has been deprived of a right "secured by the Constitution and laws" within the meaning of §1983, *Baker* v. *McCollan* (1979) 443 U.S. 137; 61 L.Ed.2d 433; 99 S.Ct. 2689.

The Constitutional right claimed by the owners to have been violated is a taking of property without due process and without payment of just compensation as required by the Fifth and Fourteenth Amendments to the United States Constitution. The requirements of due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 569; 33 L.Ed. 548; 92 S.Ct. 2701.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests a person has already acquired in specific benefits. *Board of Regents* v. *Roth, supra,* 408 U.S. 564, p. 577.

The property owners never applied for a permit to develop the land in controversy. Even if they had applied, the application by itself, would not have given appellants a vested interest in the permit. Under California law, no right to complete a project vests unless an owner has obtained all necessary permits, performed substantial work, and incurred substantial liability in good faith reliance on that permit. *Avco Community Developers, Inc.* v. *South Coast Regional Comm'n* (1976) 17 Cal.3d. 785, 791; 553 P.2d 546; 132 Cal.Rptr. 386. In this case, MARTINOS have never applied for a permit nor performed substantial work on the property. All they ever did

was to request information from the WATER DISTRICT and MORGAN HILL concerning their property. They submitted no plans, went through no review process and were never subjected to any invasion or appropriation of any valuable property right which they possessed. The District Court found that because no deprivation of any property interest had occurred, the case was not ripe for review. Without a taking, there can be no due process violation and thus no claim is stated under 42 U.S.C §1983.

Patsy v. *Board of Regents of the State of Florida,* (1982) 102 S.Ct. 2557, dealt with a plaintiff who sought declaratory or injunctive relief for a federal civil rights act violation based upon the fact that her employer had denied her employment opportunities solely on the basis of her race and sex. The plaintiff had been rejected for more than 13 positions prior to commencing her suit.

This case is not even similar to *Patsy,* v. *Board of Regents of the State of Florida, supra,* 102 S.Ct. 2557. The gravamen sounds in inverse condemnation. The purpose of §1983 was to make the federal courts available to individuals who were being oppressed by state authorities, "the very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law. . . . " *Patsy, supra.* There is neither evidence nor allegation in this case that the property owners were being discriminated against on the basis of race or sex. There is neither evidence nor allegation that property owners the property owners belonged to a minority group which had traditionally been discriminated against and possessed little political power.

While a civil rights violation can be alleged on the basis of a taking of property, if "standing" or "ripeness" is lacking there can be no taking and it is this absence of taking which negates the the property owners civil rights claim, not their obligation to exhaust state administrative remedies. *Patsy* in no way stands for the proposition that the United States Congress in creating §1983 intended that clever pleaders would be able to attach a civil rights cause of action to every complaint. Courts should not tolerate sham, however ingenious.

Furthermore, *Patsy* dealt with providing relief or compensation to a plaintiff who had suffered a deprivation of federally protected rights. In this case, the property owners have never attempted to sell their property, nor have they provided plans for its development. It is not inconceivable that their rights could be abrogated in the future were they to apply for permits and have such applications unconstitutionally denied. However, that is not this case. It is this very ripeness for judicial intervention which the District Court determined was lacking when it granted the motion for summary judgment filed by the WATER DISTRICT and MORGAN HILL.

On a number of occasions, the Federal Courts have recognized the distinction between past deprivations and future possible events. In *Whitner* v *Davis* (9th Cir. 1969) 410 F.2d. 24, the court held that, while a plaintiff in an action under 42 U.S.C. §1983 is not required to exhaust a state administrative remedy designed to provide a means of obtaining relief from, or compensation for, a deprivation of civil rights which has already occurred; the plaintiff must exhaust remedies which provide a means of forestalling a threatened future deprivation of civil rights.

Although recognizing that claims under 42 U.S.C. §1983 are not generally subject to the requirement that state remedies be first exhausted, the court in *Toney* v *Reagan* (9th Cir. 1972) 467 F.2d 953, cert.den. *Mabey* v *Reagan*, 409 U.S. 1130; 35 L.Ed.2d 263; 93 S.Ct. 951, held that prospective, as distinguished from retrospective, state administrative remedies must be exhausted in order to state a claim upon which relief can be granted under the Civil Rights Act, so long as those procedures are fair and adequate.

As a matter of law Petitioners have not taken unlawfully any of property owners' real property; have not denied property owners' substantive or procedural due process of law through arbitrary or discriminatory action or otherwise; and have not, on any theory, infringed upon any of property owners' rights under the United States Constitution. If this Court accepts those conclusions, then property owners' cause of action under the Federal Civil Rights Act (42 U.S.C. §1983) must also fail.

The statute provides relief only for violations of rights, privileges or immunities specifically guaranteed by the United States Constitution and laws. *Woods* v *Strickland,* (1975) 420 U.S. 308, 327 (1975); 43 L.Ed.214; 95 S.Ct. 992. Admittedly, the Civil Rights Act affords a cause of action for a taking of property affected by a land-use regulation. *Lake County Estates, Inc.,* v *Tahoe Regional Planning Agency* (1979) 440 U.S. 391, 59 L.Ed.2d 402; 99 S.Ct. 1171. But in the absence of any violation of a federally guaranteed right, the Civil Rights Act has no force or application. See *Shellburne, Inc.* v *New Castle County,* (D.Del. 1968) 293 F.Supp. 237.

The essence of property owners' allegations of violation of the Civil Rights Act turn on the same facts and interpretation of the facts relating to their inverse condemnation claim. If property owners cannot state a cause of action for a "taking" under inverse condemnation there cannot be any violation of the Civil Rights Act resulting from the same government conduct. See *Pamel Corporation* v *The Puerto Rico Highway Authority,* (C.A. Puerto Rico 1980) 621 F.2d 33.

CONCLUSION

The issue of the ability of local government entities to participate in State and Federal flood control programs by enacting general regulatory ordinances free of liability for monetary damages in inverse condemnation and under the Federal Civil Rights Act, where no eminent domain suit has been filed and no specific proposal for individual land-use has been presented for implementation, is of utmost importance to the effective operation of local government today.

Federal Court intervention should occur only where the circumstances covered in this Court's *Agins* decision both as to standing and ripeness and precondemnation blight have occurred.

Petitioners are hopeful that review by this Court will clarify the rights of both local government and private property owners in this sensitive and important area.

Therefore, it is respectfully prayed that this Court grant a Writ of Certiorari, reverse the decision of the Court of Appeals for the Ninth Circuit, and remand this matter for determination consistent with your decision.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRUNO MARTINO AND EUGENIA MARTINO,
Plaintiffs/Appellants,

vs.

SANTA CLARA VALLEY WATER DISTRICT, et al.,
Defendants/Appellees.

No. 81-4578
D.C. No. C 80 4017 WHO
OPINION

On Appeal from the United States District Court for the Central District of California
Honorable William H. Orrick, Judge, Presiding

Argued and Submitted September 14, 1982

Before: BROWNING, Chief Judge, PREGERSON, Circuit Judge, and SOLOMON,* District Judge.

PREGERSON, Circuit Judge:

Bruno and Eugenia Martino brought this action for damages against the Santa Clara Valley Water District ("Water District"), the City of Morgan Hill ("Morgan Hill") and the Water District's chief real estate agent, Donald A. Lawrie. The Martinos sought damages for inverse condemnation and for violations of the Federal Civil Rights Act, 42 U.S.C §§ 1983, 1985 and 1986, arising out of an alleged "taking" of their property without just compensation.

The district court granted defendants' motion for summary judgment against the Martinos on both claims. The court held that the Martinos' failure to submit a development plan upon

* Honorable Gus J. Solomon, Senior U.S. District Judge for the District of Oregon, sitting by designation.

which the Water District and Morgan Hill could act precluded the Martinos from proving an "invasion or appropriation" of their property rights and that the case was therefore not ripe for adjudication. The Martinos appealed.

Based on our belief that the Martinos' complaint alleged facts which, if true, could constitute a "taking" whether or not a development plan was submitted, we hold that summary judgment was inappropriate. Accordingly, we reverse and remand the matter for trial.

FACTS

The Martinos are the owners of approximately 4.4 acres of land in the City of Morgan Hill, Santa Clara County, California. The Martinos' land is located within a 66,400-acre area covered by the Llagas Creek Watershed Project Plan ("the Llagas Project"), a flood-control program begun in 1968. The Llagas Project has three basic objectives: (1) providing land-treatment measures to reduce erosion and sediment production within the watershed; (2) modifying 29.4 miles of the Llagas Creek and its major tributaries to increase their capacity and constructing levees to limit the flood-plain width along 2.8 miles of Llagas Creek; and (3) raising Chesbro Dam 11 feet. From the inception of the Llagas Project, part of the Martinos' land has been slated for eventual public acquisition by the Water District for channel excavation and construction of a waterway levee.

In March 1974, the Water District adopted Ordinance No. 74-1, which provides, in pertinent part:

> 7.2 Without having first secured a permit . . . or other written approval from the [Water] District, it shall be unlawful after the effective date of this ordinance for any person, firm, corporation, . . . or district to do or cause to be done any of the following:
>
> . . .
>
> B. Construct, place or maintain any structure or perform any grading upon a levee or on a District project.

In addition, Section 10 of the ordinance states:

> In order to permit the provision of flood control services by the District, the Engineer will request, wherever equitable and appropriate, that the city or the county having jurisdiction secure flood control dedications to the District from landowners seeking a change of land use.

In August 1975, the Martinos applied for subdivision of their land into three parcels. The Morgan Hill Planning Commission approved the application subject to the condition that the Martinos reserve or dedicate to the Water District a 96-foot-wide right of way across their property. The Martinos appealed the Planning Commission determination to the Morgan Hill City Council. The City Council ordered that the dedication be reduced to 35 feet and that an additional 61 feet be reserved for eventual purchase by the Water District if needed. The Martinos subsequently conveyed the 35-foot easement to the Water District without compensation and leased one of the subdivided parcels for the construction of a Burger King restaurant.

In January 1980, Morgan Hill completed a "General Plan Policy Document," which provided, in part, that "[d]evelopment shall be prohibited within the floodway areas." Apparently in response to this declaration of policy, the Martinos wrote a letter to Lawrie, chief real estate agent for the Water District, dated July 3, 1980, inquiring (1) when the Water District intended to purchase or condemn the proposed right of way across the Martinos' property, and (2) what would be the effect, if any, on the right of way if the Martinos submitted a development plan for either or both of their remaining two parcels.

By letter dated July 18, 1980, Lawrie informed the Martinos that construction on the relevant portion of the Llagas Creek "probably would not occur prior to 1986" and that acquisition of the necessary rights of way "would normally occur in the preceding year, most likely 1985." Lawrie explained that the Llagas Project was then in a moratorium stage

pending completion of an Environmental Impact Statement and that the target date for reauthorization of the Project was July 1, 1981. Lawrie further stated:

> The proposed right of way width is 180 feet,[1] as indicated on the attached drawing. Previously, an easement was granted to the District by you across a portion of the property. The right of way requirements would be the same, should you submit a development plan prior to project acquisition.

The 180-foot right of way comprises, according to the Martinos, 1.12 acres, or one-third of the subject property.

On or about July 21, 1980, the Martinos wrote again to Lawrie requesting, among other things, more specific information regarding the likely effect of the proposed right of way on any development plan that the Martinos might later submit. Lawrie, by letter dated July 25, 1980, responded:

> If you submit a development plan during the present restudy period and prior to the completion and approval of the Environmental Impact Statement, the District would request that the entire 180 feet of right of way be dedicated. Once we are assured that the Federal project is going to proceed, and if, subsequently to that time, a development plan is submitted, we would request that the land be reserved for future purchase.

In September 1980, the Martinos sought an informal opinion from Morgan Hill regarding the prospects of developing their property in light of the Water District's plans for public acquisition. Morgan Hill responded by letter dated September 16, 1980, that the Martinos "would have to meet all City and Water District requirements in order to have the project approved" and "go through the proper steps with engineering and architectural [sic] consultants to prepare plans for the City and meet the City requirements and obtain the

[1] It was not apparent from the record why or when the proposed right of way was enlarged to a width of 180 feet.

necessary approvals." It is undisputed that the Martinos never applied for a development permit and never attempted to sell the property.

The Martinos filed their complaint on October 24, 1980. They alleged that the acts of the Water District and Morgan Hill were intended to preclude all development and use of their property and to depress the value of their property pending public acquisition. According to the Martinos, their property "has been deprived of all of its reasonable beneficial economic uses and its economic return and marketability," thus resulting in a "taking" of the property without just compensation in September 1980. The Martinos also alleged that these same acts, taken together with the acts of Lawrie as the Water District's agent, consituted a violation of the Federal Civil Rights Act, 42 U.S.C. § § 1983, 1985 and 1986.

Defendants moved for summary judgment on both claims, contending, in essence, (1) that the matter was not "ripe" for judicial intervention because the Martinos had not submitted a development plan upon which the Water District and/or Morgan Hill could take official action; (2) that the conduct alleged by the Martinos did not amount to a "taking"; and (3) that even if a "taking" had occurred, the Martinos' proper remedy was declaratory relief and not damages.

After oral argument, the district court tentatively denied the motion. Less than one week later, however, the court requested reargument on the question whether the opinions of the California Supreme Court and the U.S. Supreme Court in *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980), were dispositive of the instant case. At the conclusion of reargument on October 15, 1981, the court stated from the bench:

> The California Supreme Court through Justice Richardson, and the Supreme Court of the United States through Justice Powell, have made it abundantly clear that simply relying on a general plan of the city, or the water district, is not sufficient to constitute inverse condemnation.
>
> Both decisions make it clear—and counsel—able counsel who have read both of these decisions agree—that there must be an invasion.

> Now the question as to whether or not there is an exception to this rule, I don't think . . . applies in this case.
>
> In the first place, the cases that were relied upon actually involved takings. But, in any event, it doesn't seem to me that the case is now ripe for trial. And using the language of the court in Selby against the City of San Buenaventura: The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property. In order to state a cause of action for inverse condemnation, there must be an invasion or appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specifically affect the landowner to his injury.
>
> And in the case at bar, the landowner has made no application for approval of a specific form of development.

(Transcript of oral argument at 51-52.) The court then granted the motion for summary judgment.

STANDARD OF REVIEW

The district court's ruling may be affirmed only if it appears from the record, after viewing all evidence and factual inferences in the light most favorable to the Martinos, that there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law. *E.g., Dosier* v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1300 (9th Cir. 1981). In an appeal from an order granting a motion for summary judgment, the *de novo* standard of review applies. *See, e.g., State ex rel. Edwards* v. *Heimann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980).

ANALYSIS

1. *Submission of a Development Plan*

As set forth above, the district court purported to rely on the decisions in *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980), in concluding that the Martinos could show no "invasion" of

their property rights. In *Agins*, landowners sought damages for inverse condemnation based on a zoning ordinance which permitted them to build no more than five single-family residences on their five-acre tract. As in the instant case, the landowners in *Agins* did not submit a development plan or apply for a permit to use or improve their property following the adoption of the zoning ordinance. In holding that the ordinance did not effect a "taking," the California Supreme Court stated:

> [W]e hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. The ordinance before us had no such effect.... [T]he RPD-1 zoning allows plaintiffs to build between one and five residences on their property. This belies plaintiffs' claim that development of their land is forever prevented. Taking cognizance of the use which plaintiffs were entitled to make of their land the trial court was justified in finding that the ordinance did not unconstitutionally interfere with plaintiffs' entire use of the land or impermissibly decrease its value.

24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

The U.S. Supreme Court also upheld the ordinance, stating:

> The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S., at 124.
>
> 447 U.S. at 262-63 (footnote omitted).

The district court apparently interpreted the decisions in *Agins* as holding that there could be no "invasion" of a landowner's property rights until a development plan had been passed upon by the local government agency. During oral argument on this point the court stated:

> Well now, the California courts have held that there has to be an actual invasion of a property right; that San Buenaventura case . . . and the two Supreme Court cases, say that—in that case, in the Agins case, the property owner was free to do whatever he wanted, until—and put up a plan. But the plan had to be approved by the Planning Board, or whatever it was; and that until the Planning Board acted there was nothing to stop him from doing anything.

(Transcript of oral argument at 45.)

We disagree with the court's interpretation of the *Agins decisions*. While both opinions are somewhat unclear on this point,[2] the California Supreme Court and the U.S. Supreme Court did not appear to rely heavily upon the fact that the

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[2] The district court may have been misled by the manner in which Justice Powell narrowed the issues before the Court:

> The appellants' complaint framed the question as whether a zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments. The California Supreme Court rejected the appellants' characterization of the issue by holding, as a matter of state law, that the terms of the challenged ordinance allow the appellants to construct between one and five residences on their property. The court did not consider whether the zoning ordinance would be unconstitutional if applied to prevent appellants from building five homes. ***Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions.*** [Citations.] Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.
>
> *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added).

Similarly, the Martinos do not claim only that the ordinance in question effected a "taking" *as applied* to a particular permit or variance application; they also contend that there was a "taking" by virtue of the *mere enactment* of Ordinance No. 74-1. As it did in *Agins*, this contention should supply the requisite "concrete controversy" without regard to whether a development plan was submitted.

(Footnotes continued on following page)

landowners had not submitted a development plan; rather, that fact merely prevented the landowners from attacking the regulation "as applied." The primary basis for rejecting the landowners' inverse condemnation claim was that the regulation "on its face" did not "deprive the landowner of substantially all reasonable use of his property," 24 Cal. 3d at 277, 548 P.2d at 31, 157 Cal. Rptr. at 378, and did not "prevent the best use of appellants' land . . . [or] extinguish a fundamental attribute of ownership," 447 U.S. at 262. In other words, the landowners in *Agins* had shown an "invasion" of their property rights, contrary to the interpretation of the district court, but not an "invasion" of sufficient magnitude to have "denied [the landowners] the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments." *Id.* at 262-63.[3] We hold, therefore, that the failure to submit a development plan is not, in and of itself, a bar to an attack on the ordinance "on its face." Because the Martinos' facial attack raises material issues of fact as to whether the mere enactment of the ordinance "prevent[ed] the best use of appellants' land . . . [or] extinguish[ed] a fundamental attribute of ownership," *id.* at 262, we remand to the district court for a determination of those issues.

(Footnotes continued from preceding page)

In fact, the Martinos' failure to submit a development plan may not even bar their "as applied" claim that the actions and policies of the Water District and Morgan Hill in implementing the ordinance effected a "taking" of their property. Although under *Agins* such a claim would ordinarily not be ripe until an actual development plan had been submitted and passed upon, the Martinos contend that submission of a plan should not be required when it would be an "idle and futile act." *See, e.g., Dahl* v. *City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974); *Ogo Ass'n* v. *City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974). The district court did not reach this issue, apparently because it believed that the "idle and futile act" exception was inapplicable unless a "taking" could be proved or the case was otherwise ripe for trial. In light of our disposition, this issue should also be addressed on remand.

[3] This reading of *Agins* is consistent with the recent case of *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621 (1981). In that case, the appellant sought damages for inverse condemnation after the City of San Diego had rezoned part of appellant's property and placed the entire property within an open-space designation. Although appellant had not submitted any plan for the development of its property, it alleged that "the city had deprived it of the entire beneficial use of the property through the rezoning and the adoption of the open-space plan." *Id.* at 626. The trial court concluded that

(Footnotes continued on following page)

The Martinos also seek to recover on a second theory. A "taking may be found without any physical invasion where, for example, "a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of property . . . ." *Richmond Elks' Hall Association* v. *Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977). This typically occurs when the public entity excessively delays condemnation proceedings after the property is slated for acquisition or otherwise acts unreasonably. *See id.* at 1330-31; *see also Foster* v. *City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968) ("taking" found where city commenced condemnation proceedings and kept *lis pendens* in effect for five years after stop order was issued on project, then abandoned condemnation proceedings after ten years and commenced new proceedings). To the extent that the Martinos seek to prove that a "taking" occurred because of unreasonable delays or other unreasonable conduct in the condemnation process, their failure to submit a development plan is irrelevant.

This theory also raises material issues of fact which preclude summary judgment. Primarily, the court must determine on remand whether the Water District's and Morgan Hill's actions in implementing the Llagas Project, including the

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there had been a "taking," and the California Court of Appeal affirmed, holding that "[a]ppellant's failure to present a plan for developing the property . . . did not preclude an award of damages in its favor." *Id.* at 628.

The California Supreme Court granted the city's petition for a hearing and retransferred the case to the Court of Appeal for reconsideration in light of the *Agins* decision. The appellate court thereupon reversed the judgment of the trial court in an unpublished opinion, holding that mandamus or declaratory relief—not inverse condemnation—was the proper remedy for "alleged overzealous use of the police power" by the city. The court stated that whether a "taking" had occurred to justify such relief involved "disputed fact issues not covered by the trial court in its findings and conclusions," including a finding of the extent to which appellant would have been permitted to develop its property by the city. *Id.* at 630, 632 & n.12. The U.S. Supreme Court subsequently dismissed the appeal, holding that the appellate court's failure to find whether a "taking" had occurred precluded review for lack of a final judgment. *Id.* at 633. At no time did any of these reviewing courts suggest that appellant's failure to submit a development plan to the city was fatal to its claim that the open-space plan "on its face" gave rise to a compensable "taking."

delay in commencing condemnation proceedings, were so unreasonable as to result in "planning blight" for which the Martinos may be entitled to compensation. *See id.* at 665-66.

2. *Damages as Inverse Condemnation Remedy*

Defendants also argue that even if a "taking" had occurred, the California Supreme Court's decision in *Agins* provides an analytical basis for upholding the district court's order granting the motion for summary judgment on the Martinos' inverse condemnation claim. Although the district court apparently did not rely on this aspect of *Agins,* the California Supreme Court stated in extended dictum that landowners burdened by excessive governmental regulation could not recover damages for inverse condemnation:

> In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.

24 Cal. 3d at 276-77, 598 P.2d at 31, 157 Cal. Rptr. at 378.[4] The Martinos do not seek either a writ of mandamus to compel action by the Water District or Morgan Hill or a declaration that Ordinance No. 74-1 is invalid. Thus, if we chose to follow the *Agins* dictum, we could affirm the order granting summary judgment on a different ground from that relied upon by the district court.

The present vitality of this aspect of *Agins* has, however, been substantially undercut by Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co.* v. *City of San Diego,* 450 U.S. 621, 636-61 (1981), in which Justices Stewart, Marshall and Powell joined. In reaching the merits of the case after a majority of the Court had voted to dismiss the appeal for

[4] The court's pronouncement is dictum because, having held that there had been no "taking," the court did not need to decide what remedies were and were not appropriate had a "taking" actually occurred.

lack of a final judgment (*see* note 3, *supra*), Justice Brennan stated:

> The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a "taking," and recover just compensation if it does so.

Id. at 660. Justice Brennan rejected the California Supreme Court's justification of "various policy considerations" for its decision in *Agins*, stating that the applicability of constitutional guarantees does not hinge on legislative policy judgments, nor should the vindication of these guarantees depend upon the expense in doing so. *Id.* Accordingly, Justice Brennan proposed a constitutional rule requiring that, once a court finds that a regulation has resulted in a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking" and continuing until the entity chose to rescind or otherwise amend the regulation. *Id.* at 658.

Justice Rehnquist, in a concurring opinion, stated:

> If I were satisfied that this appeal was from a "final judgment or decree" of the California Court of Appeal, as that term is used in 28 U.S.C. § 1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of JUSTICE BRENNAN. Indeed, the Court's opinion notes "that the federal constitutional aspects of that issue are not to be cast aside lightly. . . ." *Ante*, at 633.

Id. at 633-34. Thus, a majority of the Court apparently is of the opinion—contrary to that of the California Supreme Court in *Agins*—that damages *are* recoverable for inverse condemnation.

Even if we were persuaded by the dictum in *Agins* to hold that the Martinos could not recover damages for inverse condemnation, summary judgment would be improper insofar as it relates to the Martinos' claim under the Federal Civil Rights Act, 42 U.S.C. § § 1983, 1985 and 1986. While "the contours of municipal liability under § 1983 . . . are currently in

a state of evolving definition and uncertainty" (*see City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 246, 256 (1981)), an action for damages under section 1983 for the overregulation of land was recognized by the U.S. Supreme Court in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). The district court improperly denied the Martinos an opportunity to try to prove such a claim.

SUMMARY

Based on the above analysis, the district court's order granting defendants' motion for summary judgment is reversed and the case remanded for trial.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK

WILLIAM L. WHITTAKER
CLERK

450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIF. 94102
(415) 556-3031

CASE NUMBER: C80-4017 WHO

CASE TITLE: Martino et al -vs- Santa Clara Valley Water District

DATE MANDATE FILED: 4/14/83

TO COUNSEL OF RECORD:

The mandate of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Yours very truly,

WILLIAM L. WHITTAKER,
Clerk

Pat Henneman
Case Systems Administrator

Distribution:

Civil — Counsel of Record
Criminal — Counsel of Record
U.S. Marshal (Copy of Mandate)
U.S. Probation Office

JUDGMENT

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRUNO MARTINO AND EUGENIA MARTINO,
Plaintiffs/Appellants,

vs.

No. 81-4578
CV-80-4017-WHO

SANTA CLARA VALLEY WATER DISTRICT, CITY OF MORGAN HILL AND DONALD A. LAWRIE,
Defendants/Appellees.

APPEAL from the United States District Court for the NORTHERN District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the NORTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is Reversed Remanded.

Filed and entered April 14, 1983.

APPENDIX C

Ordinance No. 74-1

An Ordinance Of Santa Clara Valley Water District Defining Limits Of Flood Control Responsibility; Providing For Establishment Of Designated Floodways Upon Due Notice And Hearing; For Maintenance Of Watercourses; For Joint Use Of Projects; For Dedications; Prohibiting Pollution Of District Water Supplies And Injury To District Projects, As Defined, And Encroachment Upon Or Interference With Watercourses Except By Permit; Providing Penalties For Violation Hereof; And Repealing Ordinance 59-1

The Board of Directors of Santa Clara Valley Water District do ordain as follows:

SECTION 1 INTENT

It is the intent of this ordinance to secure the health, safety and welfare of the people of the District by prudent floodplain management, by protecting the quality of District water supplies, and by securing maintenance of watercourses and prohibiting injury to District property and projects and harmful amendment of watercourses.

It is further the intent of this ordinance to provide a definition of the general limits of watercourses on which the District can accept rights of way and responsibility for construction and/or maintenance of flood control facilities.

It is further the intent of this ordinance to insure that the repeal of Ordinance 59-1 accomplished hereby, shall not affect permits heretofore given and rights of every nature heretofore established pursuant to said Ordinance 59-1.

SECTION 2 DEFINITIONS

2.1 "Bank or Banks of a Watercourse" means the sides of a watercourse the top of which shall be the topographic line roughly parallel to stream center line where the side slopes intersect the plane of ground traversed by the watercourse. Where banks do not distinguishably end, the surrounding country being extension of the banks, the top of such banks shall be defined by the designated floodway thereof or as determined by the Engineer.

2.2 "Board" means the Board of Directors of Santa Clara Valley Water District.
2.3 "Design Flood" means the selected flood against which protection is provided, or eventually will be provided, by means of flood protective or control works.
2.4 "Designated Floodway" means the channel of a stream and that portion of the adjoining floodplain required to reasonably provide for passage of the design flood.
2.5 "District" means Santa Clara Valley Water District.
2.6 "District Project" means any facility, structure or improvement of the District including, without limitation, lands, facilities, structures or improvements and appurtenances thereto owned or controlled by the District for water conservation, water utility, flood control or any lawful District purpose.
2.7 "Engineer" means the Chief Engineer of the District, or his designated representative.
2.8 "Levee" means an elongated embankment constructed where required to contain flooding.
2.9 "Pollution" means impairment of water quality to a degree which adversely and unreasonably affects a beneficial use of the water.
2.10 "Structure" means anything made or constructed and having its foundation or support upon or within the ground.
2.11 "Watercourse" means an elongated channel or depression, whether natural or man-made, in which water does or may flow and may include the overflow area, if any, of such channel or depression. For the purposes of this ordinance "watercourse" includes such channels or depressions, although the same may be by reason of size of area drained not deemed to be a flood control facility.

SECTION 3 DESIGNATED FLOODWAYS

3.1 Intent: It is the intent of this section to provide a procedure to accomplish floodplain management by the establishment of designated floodways pursuant to the Cobey-Alquist Flood Plain Management Act and the Santa Clara Valley Water District Act, which procedure shall afford all affected persons due notice and opportunity to be heard.

3.2 Report:

A. Prior to adoption of an ordinance establishing a designated floodway in any flood control zone of the District, the Engineer shall prepare a written report which shall contain among any other matter he may deem pertinent and informative the following:

(1) A description of the design flood.

(2) A draft of the proposed ordinance which shall include a description of the floodway proposed to be designated, which description shall be by use of a map or a recent aerial photograph upon which said floodway is shown.

(3) A general delineation of the area affected, which delineation may be accomplished by naming the affected stream and the reach thereof by reference to identifiable landmarks.

B. Said report shall be presented the Board at any regular or special meeting. At that meeting, or at any subsequent meeting, the Board may determine that it will consider adoption of an ordinance establishing the floodway pursuant to said report.

C. Said report shall be mailed to each affected city and the County of Santa Clara at least 30 days prior to a public hearing as provided in Section 3.3.

3.3. Hearing:

A. If the Board shall determine to consider adoption, it shall give notice thereof and of the time and place of a public hearing thereon.

B. Said notice shall contain all of the matter specified in Section 3.2 and shall further contain the following:

(1) A statement that the Engineer has prepared a written report and that all interested persons are invited to call at the offices of the District to examine said report.

(2) A statement that the question of adoption of an ordinance designating the area as described by the Engineer as a floodway will be before the Board for consideration.

(3) A statement of the time and place when the Board will consider such adoption.

(4) A statement that all persons interested or in anywise affected by the action so proposed may, in person or by representative, appear and submit evidence concerning said report.

C. Said notice shall be given at least fifteen, but not more than thirty, calendar days before the hearing in the following manner:

(1) By publication at least once in a newspaper of general circulation, published and circulated in the District, and

(2) By mailing of notices to the county or any city having jurisdiction and to the recorded legal owners of all property within the boundaries of the area proposed to be designated as floodway and within 500 feet of such boundaries, at the addresses shown on the last equalized assessment roll.

3.4 Adoption of Ordinance: Following said public hearing, and on the basis thereof, the Board shall make its findings and determinations with regard to adoption of the ordinance proposed. The Board may not determine to establish a designated floodway greater in area than was shown in the proposed ordinance as noticed, but the Board may, upon the basis of said hearing, adopt its ordinance establishing a designated floodway of lesser area than was so shown.

SECTION 4 MAINTENANCE BY OWNER

Every owner of a watercourse whether a person, firm, corporation, or governmental agency, or his lessee or tenant, shall keep and maintain the same free from obstacles which will prevent or unreasonably change or retard the flow of the water;

and every owner of a structure within or directly affecting a watercourse shall maintain the safe condition and function of the same.

SECTION 5 DISCHARGE OF DRAINAGE

The County of Santa Clara, any municipality and any agency or person within the District shall have the right to discharge drainage water directly into watercourses, except water supply canals, of the District subject only to the approval procedure set forth in this ordinance.

SECTION 6 FLOOD CONTROL, RESPONSIBILITY

6.1 The responsibility of this District for the control of flood and storm water is an obligation to make efficient use of its funds in the areas of study, planning and acquisition and to act lawfully in designing, constructing and maintaining such works as the Board shall approve. The responsibility of the District does not and cannot extend to an affirmative obligation to take specific measures of any nature not mandated by governing legislation or judicial order. Nothing in this ordinance shall be deemed to be or construed as a warranty or assurance that flooding and flood damage will not or cannot occur anywhere in the District. However, the District will provide flood control service in an emergency to the extent of its resources and ability. The District accepts an obligation to design, construct and maintain its works in such manner as to avoid or minimize disturbance of the natural environment.

6.2 This District accepts responsibility for construction and maintenance, or acceptance and maintenance, of flood control works and for control of flood and storm waters of the District subject nevertheless to the following:

A. The District will accept such responsibility in a reach or portion of a watercourse only if it has sufficient legal title or right of way therein. Wherever appropriate the District will attempt to acquire such title or right of way.

B. Artificial channels of any kind are excluded from District responsibility unless the same are constructed by the District or are approved and adopted by the Board.

C. A reach or portion of a natural watercourse will not be accepted for District flood control responsibility unless the tributary watershed area upstream of such reach or portion is in excess of 320 acres (one-half square mile); *provided,* that such acceptance may extend to an area greater or less than 320 acres pursuant to agreement with the city or county having jurisdiction.

6.3 A watercourse or reach or portion thereof for which the District does not accept flood control responsibility by reason of the exclusions specified in subparagraphs B and C of Section 6.2 above is deemed a local drainage facility.

SECTION 7 PROHIBITIONS

7.1 The pollution of the water supplies of the District, whether in surface streams, reservoirs or conduits of any kind, or of groundwater, by any direct or indirect means whatever, including the deposit of polluting matter of any kind upon the banks of a watercourse, lake or reservoir where the same may reach or affect such water supplies, and including the discharge of polluting storm waters or sanitary sewage, is prohibited.

7.2 Without having first secured a permit pursuant to Section 8 hereof, or other written approval from the District, it shall be unlawful after the effective date of this ordinance for any person, firm, corporation, the County of Santa Clara, the Government of the United States and agencies thereof, the Government of the State of California and agencies thereof, or any municipal corporation or district to do or cause to be done any of the following:

A. Construct or place any structure or perform any grading within a designated floodway; or, where no floodway has been designated, between the banks of a watercourse, or within 50 feet of the top of such banks.

B. Construct, place or maintain any structure or perform any grading upon a levee or on a District project.

C. Excavate within a designated floodway, upon a levee, or upon or between the banks of a watercourse, or District project.

D. Deposit material of any kind within a designated floodway, upon a levee, or District project, or upon or within the banks of a watercourse.

E. Construct or place any outlet for discharging drainage waters within a designated floodway, upon or within the banks of a watercourse, or District project.

F. Plant any form of flora within a designated floodway, upon or within the banks of a watercourse, or District project.

G. Trespass in any manner whatsoever including the driving of vehicles on any property in which the District owns a fee simple interest or on which the District owns an exclusive easement for flood control, drainage or water conservation or distribution purposes, except such areas as have been opened to and developed for public recreational or other use.

7.3 Permits shall not be withheld upon unreasonable or insubstantial grounds.

SECTION 8 PERMIT PROCEDURE

8.1 Any person, firm, corporation or public agency, except those filing maps pursuant to the State Subdivision Map Act or local ordinances adopted pursuant thereto, desiring to do any of the acts for which a permit is required pursuant to this ordinance, shall make application for such permit to the Engineer. Said applications shall contain such information as the Engineer shall reasonably require.

8.2 Any public agency, or any person, firm or corporation filing a map pursuant to the State Subdivision Map Act or local ordinances adopted pursuant thereto, desiring to do any of the acts for which a permit is required pursuant to this ordinance shall, in lieu of the application procedure set forth above, submit engineered improvement plans to the Engineer.

8.3 Upon receipt of such application for permit or engineered improvement plans or additional information as hereinafter set forth, the Engineer shall make such investigations as he deems necessary to determine, among other things, whether or not the

proposed work or activities intended will impede, restrict, retard, pollute, change the direction of the flow of water, catch or collect debris carried by such water; is located where natural flow of the storm and flood waters will damage or carry any structure or any part thereof downstream; or will in his opinion damage, weaken, erode, or reduce the effectiveness of the banks to withhold storm and flood waters, or interfere with maintenance responsibility or with structures placed or erected for flood control, water conservation or distribution. In order to make said investigation, he may return said application or improvement plans to the applicant for additional information as may be required to complete his investigation. After investigation said Engineer shall approve, approve conditionally, or disapprove the application or improvement plans on the basis of his investigations. If a permit is granted, it shall state the conditions subject to which it is granted.

8.4 Within fifteen (15) days of District receipt of such application for permit or engineered improvement plans or additional information, the Engineer shall respond, acknowledging the same and advising the applicant of any reason beyond the Engineer's control why action thereon cannot be taken within thirty (30) days of said District receipt. Where no such notification of anticipated delay and the reason therefor is given by the Engineer, he shall act upon every application for permit, or engineered improvement plans or additional information within thirty (30) days of its receipt.

8.5 In the event an applicant is aggrieved by the action of the Engineer, or by reason of the requirements of this ordinance, he may, within fifteen (15) days from date of decision of the Engineer, make an appeal in writing to the Board. The Clerk of said Board shall set a time for hearing on such appeal within three (3) weeks from the date of receipt of said appeal, and shall mail or deliver notification to the appellant of said date at least two (2) weeks prior to the date so set. The appellant may waive such notification and seek a hearing at the next meeting of the Board. At the hearing of such appeal, it will be incumbent upon the appellant to show to the satisfaction of the Board that such structure so proposed will not violate Section 8.3 of this ordinance.

8.6 The permit, when issued, shall constitute authority for the applicant to proceed according to the conditions of the permit, except as to that work for which other permits are required by the County of Santa Clara or the city in which the property on which the work is to be performed is located, and as to that work for which other permits are required, such permits must be obtained from the proper legislative body, and the permit granted pursuant to terms of this ordinance shall not be effective until such other permits have been obtained. It shall be the responsibility of applicant to determine the need for such other permits.

All work for which a permit is required shall be subject to administrative regulation, such as notice by permittee of time of beginning of work, as may be necessary to insure complete inspection during all phases or stages of such work.

If the work is not done in accordance with the terms of the permit, and the instructions of the Inspector, then the permittee shall be considered to have violated the terms of this ordinance. Upon completion of the work in compliance with the permit the Engineer shall execute a Notice of Completion and, upon the request of the applicant, shall supply him with a copy thereof.

8.7 The Board may by resolution establish a schedule of fees payable upon application for permit hereunder.

8.8 This ordinance is enforceable and shall be enforced by every civil and penal means available to the District against every direct violation of the provisions thereof and any failure to satisfy the terms of a permit issued thereunder. As an additional remedy to such violations and if essential to the health, welfare, or safety of the general public, the Board may order the work to be done, excavation replaced, material removed, or may order any construction or structures placed contrary to the terms of this ordinance removed by the Engineer, which work must be paid for by the violator.

8.9 Anything hereinabove stated notwithstanding, a permit under this ordinance IS NOT REQUIRED unless the subject reach or portion of a watercourse is one having a tributary watershed in excess of 320 acres or is one which is brought under permit procedures pursuant to agreement with the city or county having jurisdiction.

SECTION 9 JOINT USE

The use of District projects jointly with a public agency, subject to conditions established by resolution of the Board, is favored, wherever such joint use is possible and conformable to the District's public duty.

SECTION 10 DEDICATIONS

In order to permit the provision of flood control services by the District, the Engineer will request, wherever equitable and appropriate that the city or the county having jurisdiction secure flood control dedications to the District from landowners seeking a change of land use. Such requests shall be pursuant to and in accordance with the procedures and conditions established by such city or county.

SECTION 11 VALIDITY

Should any Section or provision of this ordinance be found to be unconstitutional or invalid, such decision shall not affect the validity of the ordinance as a whole or any part thereof, other than the part decided to be unconstitutional or invalid.

SECTION 12 ORDINANCE 59-1 REPEALED

Ordinance 59-1 of this District is hereby repealed; *provided,* that permits heretofore given and rights of every nature heretofore acquired under said Ordinance 59-1 shall remain unaffected.

PASSED AND ADOPTED by the Board of Directors of Santa Clara Valley Water District on March 26, 1974, by the following vote:

AYES: Directors: J. Chiri, M. F. Dullea, P. T. Ferraro, J. J. Lenihan, E. A. Mirassou, C. Rush, R. T. Sapp.

NOES: Directors: None.

ABSENT: Directors: None.

SANTA CLARA VALLEY
WATER DISTRICT

By: JOSEPH CHIRI
Chairman of the Board of Directors

ATTEST:
VIOLET V. ENANDER
Clerk of said
Board of Directors

APPENDIX D

I, the undersigned, say:

That I am now and at all times herein mentioned a citizen of the United States, over the age of eighteen years, a resident of Santa Clara County, California, and not a party to the within action or cause; that my business address is 101 PARK CENTER PLAZA, San Jose, California; that I served a copy of the attached PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT by placing said copy in an envelope addressed to Bruno Martino and Eugenia Martino, c/o Joseph M. Gughemetti, Esq., Attorney at Law, 1961 Landings Drive, Mountain View, Calif. 94043; Joseph M. Gughemetti, Esq., Attorney at Law, 1961 Landings Drive, Mountain View, Calif. 94043; City of Morgan Hill, 17555 Peak Avenue, Morgan Hill, Calif. 95037; Santa Clara Valley Water District, 5750 Almaden Expressway, San Jose, Calif. 95118; Clerk, U.S. Ct. of Appeals, Ninth Circuit, P.O. Box 547, San Francisco, CA 94101 which envelope was then sealed and, with postage fully prepaid thereon, was on

_____ deposited in the United States mail at San Jose, California; that there is delivery service by United States mail at the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 19____, at San Jose, California.

_____

_____

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of July, 1983.

_____

_____